

Memorandum 2021-21

**Statutes Made Obsolete by Trial Court Restructuring (Part 8):
Representation and Indemnification of Court and Court Personnel
(Discussion of Issues)**

In 2000, the Legislature directed the Commission to review the codes and recommend revisions to remove material made obsolete by the major restructuring of California's trial court system that was then in progress.¹ The Commission has done an enormous amount of work on this topic since then, but some work remains undone.

Soon after the Commission began working on this topic, it circulated a massive tentative recommendation proposing hundreds of statutory revisions to reflect the trial court restructuring reforms.² The bulk of the proposed revisions were eventually included in a final recommendation and enacted into law.³ Some of the proposed revisions were removed from the proposal for further study due to concerns raised.⁴

1. See 2000 Cal. Stat. ch. 1010, § 14 (adding Gov't Code § 71674). Government Code Section 71674 currently says:

The California Law Revision Commission shall determine whether any provisions of law are obsolete as a result of the enactment of [the Trial Court Employment Protection and Governance Act], the enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997 (Chapter 850 of the Statutes of 1997), or the implementation of trial court unification, and shall recommend to the Legislature any amendments to remove those obsolete provisions. The commission shall report its recommendations to the Legislature, including any proposed statutory changes.

2. Tentative Recommendation on *Statutes Made Obsolete by Trial Court Restructuring* (Nov. 2001) (hereafter, the "2001 tentative recommendation"), available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-TrialCtRestruct.pdf>.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

3. See 2002 Cal. Stat. ch. 784; *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002) (hereafter, "TCR: Part 1").

4. TCR: Part 1, *supra* note 3, at 21-26.

This memorandum addresses one set of provisions that were removed for further study: a group of statutes relating to representation and indemnification of trial courts and trial court personnel (Government Code Sections 811.9, 990.2, 26524, 26529, 27647, and 27648). In its 2002 report on trial court restructuring, the Commission wrote:

Representation, Defense, and Indemnification of Trial Courts and Trial Court Judges

A few statutes pertain to the representation of a superior court or superior court judge by county counsel or the district attorney. These sections may have been superseded by newly-enacted Government Code Section 811.9, which requires the Judicial Council to provide for the representation, defense, and indemnification of superior courts, superior court judges, officers, and employees. The Commission is studying several issues relating to these provisions, including whether the earlier representation provisions are indeed obsolete or continue to have practical application.⁵

It is time to revisit the provisions in question and determine how to handle them.

The provisions are discussed in numerical order below, because that coincidentally happens to be a logical way to approach them. Unless otherwise stated, all further statutory references are to the Government Code.

SECTION 811.9. REPRESENTATION, DEFENSE, AND INDEMNIFICATION
OF TRIAL COURT PERSONNEL

Section 811.9 was added to the codes in 2000, as the trial court restructuring reforms were ongoing.⁶ The new provision made clear that judges, subordinate judicial officers, and court executive officers are “state officers” for purposes of the Government Claims Act (the law governing liability and immunity of public entities and their officers and employees, claims and actions against public entities and their officers and employees, insurance indemnification in this context, and the defense of public officers and employees).⁷ Similarly, the new provision made clear that people working for a trial court are considered employees of the trial court for purposes of the Government Claims Act.⁸ New

5. *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm’n Reports 1, 24-26 (2002) (footnote omitted).

6. See 2000 Cal. Stat. ch. 447, § 4.5 (SB 1533 (Costa)).

7. See Senate Floor Analysis of SB 1533 (Aug. 19, 2000), p. 4. The Government Claims Act is codified at Sections 810-998.3.

8. See Senate Floor Analysis of SB 1533 (Aug. 19, 2000), p. 4.

Section 811.9 also made the Judicial Council responsible for providing for representation, defense, and indemnification of judges, court officers, and trial court employees, and directed the Council to adopt court rules requiring its staff (then known as the Administrative Office of the Courts) to manage claims and actions involving the trial courts, their officers, and their employees.⁹

As originally enacted, Section 811.9 applied to both the superior courts and the municipal courts.¹⁰ A 2005 bill removed the municipal court references and made various other tweaks.¹¹ The section now provides:

811.9. (a) *Notwithstanding any other provision of law*, judges, subordinate judicial officers, and court executive officers of the superior courts are state officers for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive, and trial court employees are employees of the trial court for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive. The Judicial Council shall provide for representation, defense, and indemnification of those individuals and the court pursuant to Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive. The Judicial Council shall provide for that representation or defense through the county counsel, the Attorney General, or other counsel. The county counsel and the Attorney General may, but are not required to, provide representation or defense for the Judicial Council. The fact that a justice, judge, subordinate judicial officer, court executive officer, court employee, the court, the Judicial Council, or the Administrative Office of the Courts is or was represented or defended by the county counsel, the Attorney General, or other counsel shall not be the sole basis for a judicial determination of disqualification of a justice, judge, subordinate judicial officer, the county counsel, the Attorney General, or other counsel in unrelated actions.

(b) To promote the cost-effective, prompt, and fair resolution of actions, proceedings, and claims affecting the trial courts, the Judicial Council shall adopt rules of court requiring the Administrative Office of the Courts to manage actions, proceedings, and claims that affect the trial courts and involve superior courts, superior court judges, subordinate judicial officers, court executive officers, or trial court employees in consultation with the affected courts and individuals. The Administrative Office of the Courts' management of these actions, proceedings, and claims shall include, but not be limited to, case management and administrative responsibilities such as selection of counsel and making strategic and settlement decisions.

9. See *id.*

10. See 2000 Cal. Stat. ch. 447, § 4.5 (SB 1533 (Costa)).

11. See 2005 Cal. Stat. ch. 706, § 16 (AB 1742 (Committee on Judiciary)).

(c) Nothing in this section shall be construed to affect the employment status of subordinate judicial officers, court executive officers, and trial court employees related to any matters not covered by subdivision (a).¹²

As the italics indicate, the section expressly applies “notwithstanding any other provision of law.” In other words, its requirements and the referenced provisions of the Government Claims Act are apparently intended to override any contrary law on the subject.

The 2005 amendment of Section 811.9 was sponsored by the Judicial Council,¹³ as was a 2002 bill that revised various provisions in the Government Claims Act to specifically address claims against courts and court personnel.¹⁴ The current version of Section 811.9 (which incorporates the updated provisions of the Government Claims Act by reference) thus reflects both the Legislature’s views and the Judicial Council’s views on how representation, defense, and indemnification of trial court personnel should be handled in the restructured trial court system.

The section does not appear to contain any remaining material that is obsolete due to trial court restructuring.¹⁵ As best the staff can tell, **the Commission should leave Section 811.9 alone.**

SECTION 990.2. AUTHORITY TO INSURE COURT OFFICER OR ATTACHÉ

Section 990.2 is part of the Government Claims Act. The section has not been amended since 1998, when it was revised on the Commission’s recommendation to remove a reference to the justice courts.¹⁶ It currently provides:

990.2. A county may insure any officer or attaché of its superior and municipal courts against all or any part of the officer or attaché’s liability for injury resulting from any act or omission in the scope of the officer or attaché’s employment, and also may insure against the expense of defending any claim against such officer or attaché, whether or not liability exists on such claim.

12. Emphasis added.

13. See, e.g., Senate Committee on Judiciary Analysis of AB 1742 (July 12, 2005), p. 2.

14. See 2002 Cal. Stat. ch. 1007 (AB 2321 (Hertzberg)); see also Senate Committee on Judiciary Analysis of AB 2321 (June 25, 2002).

15. The references to the “Administrative Office of the Courts” are perhaps outdated, but that terminology issue is unrelated to trial court restructuring.

16. See 1998 Cal. Stat. ch. 931, § 176; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 278 (1998) (hereafter, “TCU: Revision of Codes”).

In the 2001 tentative recommendation on trial court restructuring, the Commission proposed to amend Section 990.2 to refer to “*former* municipal courts” instead of “municipal courts.”¹⁷ A Comment explained that “the reference to the municipal courts is revised rather than deleted, because a claim might still be asserted against a person formerly employed by a municipal court, even though the court itself no longer exists.” The tentative recommendation also included an accompanying Note, which solicited comments on whether the Judicial Council or the local superior court should be authorized to insure against liability of court personnel instead of, or in addition to, the county.¹⁸

In response to the tentative recommendation, the Los Angeles County Superior Court (“LASC”) suggested that “[i]n addition to the county, the local superior court and Judicial Council should be given authority to insure Court employees against liability.”¹⁹ The Contra Costa County Superior Court cautioned that the situation was complex and “further legal analysis seems prudent.”²⁰ Due to these comments, the Commission removed Section 990.2 from its proposal for further study.

The comments from LASC and the Contra Costa County Superior Court predated the above-mentioned 2002 and 2005 bills sponsored by the Judicial Council, which deleted the municipal court references from Section 811.9 and clarified and solidified the Judicial Council’s role in handling claims against trial courts and trial court personnel. Given those developments, **the staff now suggests the following amendment of Section 990.2 for purposes of a tentative recommendation:**

Gov’t Code § 990.2 (amended). Authority to insure court officer or attaché

SEC. ____ . Section 990.2 of the Government Code is amended to read:

990.2. ~~A county~~ The Judicial Council may insure any officer or attaché of its superior ~~and municipal~~ courts against all or any part of the officer or attaché’s liability for injury resulting from any act or omission in the scope of the officer or attaché’s employment, and also may insure against the expense of defending any claim against ~~such~~ the officer or attaché, whether or not liability exists on ~~such~~ that claim.

17. See 2001 tentative recommendation, *supra* note 2, at 148-49.

18. See *id.*

19. See Memorandum 2002-14, Exhibit p. 52.

20. See Memorandum 2002-14, Exhibit p. 21.

Comment. Section 990.2 is amended to reflect:

(1) Unification of the municipal and superior courts pursuant to former Article VI, Section 5(e) of the California Constitution.

(2) Enactment of the Trial Court Funding Act. See Section 70003 (“court operations” defined), 77200 (state funding of trial court operations).

(3) Enactment of Section 811.9 (2000 Cal. Stat. ch. 447, § 4.5) and subsequent legislation clarifying and solidifying the Judicial Council’s role in handling claims against trial courts and trial court personnel (see 2002 Cal. Stat. ch. 1007 and 2005 Cal. Stat. ch. 706, § 16).

The staff further suggests that the tentative recommendation **include an accompanying Note, which would solicit comments on whether the Judicial Council needs the authority that the proposed amendment of Section 990.2 would provide.** If not, the section could simply be repealed, instead of amended.

Is this proposed approach acceptable to the Commission?

SECTION 26524. REPRESENTATION OF COURT OR JUDGE BY DISTRICT ATTORNEY

Section 26524 is not part of the Government Claims Act. It provides:

26524. Upon request of any judge of the superior or municipal court, the district attorney shall appear for and represent the court or judge if the court or judge in his or her official capacity is a party defendant in any action.

The section has not been amended since 1998, when it was revised on the Commission’s recommendation to remove a reference to the justice courts.²¹

In the 2001 tentative recommendation on trial court restructuring, the Commission proposed to repeal Section 26524. The accompanying Comment said: “Section 26524 is repealed to reflect enactment of Section 811.9, which governs representation, defense, and indemnification of trial court judges, judicial officers, court executive officers, and employees.” The tentative recommendation also included a Note, which explained that Section 26524 “appears to have been superseded” by new Section 811.9, and solicited comments on “whether it should be preserved in any form.”²²

21. See 1998 Cal. Stat. ch. 931, § 197; see also *TCU: Revision of Codes*, *supra* note 16, at 293-94.

22. See 2001 tentative recommendation, *supra* note 2, at 163.

The Commission did not receive any comments on the proposed repeal of Section 26524.²³ It nonetheless removed the section from its 2002 proposal, for further study in conjunction with the other provisions relating to representation, defense, and indemnification of trial courts and trial court personnel.²⁴

Subsequent developments have confirmed that “the Judicial Council has sole authority to act on any claim against any judicial branch entity, judge or employee of the court.”²⁵ The procedures for the Judicial Council to follow in handling such claims are specified in the Government Claims Act and in court rules adopted pursuant to Section 811.9.²⁶

It therefore seems likely that Section 26524 is obsolete and should be repealed as the Commission previously proposed. **The Commission could test this by proposing as much in a tentative recommendation:**

Gov’t Code § 26524 (repealed). Representation of court or judge by district attorney

SEC. ____ . Section 26524 of the Government Code is repealed.

~~26524. Upon request of any judge of the superior or municipal court, the district attorney shall appear for and represent the court or judge if the court or judge in his or her official capacity is a party defendant in any action.~~

Comment. Section 26524 is repealed to reflect:

(1) Unification of the municipal and superior courts pursuant to former Article VI, Section 5(e) of the California Constitution.

(2) Enactment of Section 811.9 (2000 Cal. Stat. ch. 447, § 4.5) and subsequent legislation clarifying and solidifying the Judicial Council’s role in handling claims against trial courts and trial court personnel (see 2002 Cal. Stat. ch. 1007 and 2005 Cal. Stat. ch. 706, § 16; see also Sections 810-998.3; Cal. R. Ct. 20.201-10.203).

An accompanying Note could point out that Section 811.9 directs the Judicial Council to provide for representation or defense “through the county counsel, the Attorney General, or other counsel.” The Note could inquire whether there are circumstances under which the Judicial Council might want to provide for representation or defense through a district attorney, and, if so, whether Section 26524 should be amended to permit such representation upon “request of the Judicial Council” (instead of upon “request of any judge of the superior or municipal court”).

23. See Memorandum 2002-17, p. 21.

24. See Minutes (March 2002), pp. 9-10; Memorandum 2002-17, p. 21.

25. Senate Committee on Judiciary Analysis of AB 2321 (June 25, 2002), p. 5; see Section 811.9.

26. Cal. R. Ct. 10.201-10.203.

Would the Commission like to include this proposed reform and accompanying Note in a tentative recommendation?

SECTION 26529. COUNTY COUNSEL TO DISCHARGE DUTIES OF DISTRICT ATTORNEY

If the Commission proposes to repeal Section 26524 as discussed above, it should also propose a conforming revision of Section 26529, as follows:

Gov't Code § 26529 (amended). County counsel to discharge duties of district attorney

SEC. ____ . Section 26529 of the Government Code is amended to read:

26529. (a) In counties that have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523, ~~26524~~, and 26526. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party in ~~his or her~~ the officer's official capacity. Except where the county provides other counsel, the county counsel shall defend as provided in Part 7 (commencing with Section 995) of Division 3.6 of Title 1 of the Government Code any action or proceeding brought against an officer, employee, or servant of the county.

(b) Notwithstanding any other provision of law, the County Counsel of the County of Solano may, and when directed by the board of supervisors of that county shall, bring a civil action when the county, or any of its officers, has a cause of action to abate a public nuisance in the county. The County Counsel and the District Attorney of Solano County have the concurrent right to bring an action to abate a public nuisance pursuant to this subdivision.

Comment. Section 26529 is amended to reflect the repeal of Section 26524, concerning representation of a trial court or trial court judge by the district attorney.

Does the Commission want to include this proposed amendment in a tentative recommendation?

SECTION 27647. REPRESENTATION OF COURT OR JUDGE BY COUNTY COUNSEL

Under specified circumstances, Section 27647 authorizes a county counsel to represent a superior court or a superior court judge:

27647. (a) If requested to do so by the superior court of the county of the county counsel, or by any judge thereof, and insofar

as such duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent any such court or judge thereof in all matters and questions of law pertaining to any of such judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, such court or judge is concerned or is a party.

(b) This section does not apply to any of the following:

(1) Any criminal proceedings in which a judge is a defendant.

(2) Any grand jury proceedings.

(3) Any proceeding before the Commission on Judicial Qualifications.

(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.

In the past, the section also applied to justice courts and municipal courts. The reference to justice courts was deleted in 1998 on the Commission's recommendation;²⁷ the reference to municipal courts was deleted in 2019 in the annual bill on maintenance of the codes.²⁸

In the 2001 tentative recommendation on trial court restructuring, the Commission proposed to repeal Section 27647. The accompanying Comment said: "Section 27647 is repealed to reflect enactment of Section 811.9, which governs representation, defense, and indemnification of trial court judges, judicial officers, court executive officers, and employees." The tentative recommendation also included a Note, which explained that Section 27647 "appears to have been superseded" by new Section 811.9, and solicited comments on "whether it should be preserved in any form."²⁹

LASC objected to the proposed repeal, stating:

This section should not be repealed as it continues to have practical application. County counsel may be the desired choice for representation in some circumstances. *The scope of section 811.9 does not extend to all actions in which the court or its employees are represented and the authorization in section 27647 should be preserved.* Courts may contract for county counsel services pursuant to section 77212 and the authority for county counsel representation is a prerequisite to such a contract.³⁰

27. See 1998 Cal. Stat. ch. 931, § 207; see also TCU: *Revision of Codes*, *supra* note 16, at 299.

28. See 2019 Cal. Stat. ch. 497, § 144 (AB 991 (Gallagher)).

29. See 2001 tentative recommendation, *supra* note 2, at 183-84.

30. Memorandum 2002-14, Exhibit p. 54 (emphasis added).

Contra Costa County Superior Court also objected to the proposed repeal. Like LASC, that court expressed “some concern that GC 811.9 may be narrower in scope than other provisions for representation and defense.”³¹

In light of these objections, the Commission withdrew Section 27647 from its 2002 proposal, for further study. It has not revisited the section since then.

On examining the section, the staff noted the following:

- Section 811.9 pertains to representation, defense, and indemnification of courts and court personnel “pursuant to Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive” — i.e., representation, defense, and indemnification *pursuant to the Government Claims Act*. LASC and Contra Costa County Superior Court may be correct in saying that Section 27647 applies more broadly than this.

For example, Section 27647 expressly includes “any representation authorized by Section 68111,”³² which presumably would include representation of a judge who is summoned to testify in a criminal case in the judge’s official capacity (e.g., if a member of the public is accused of stealing a juror’s purse from the judge’s courtroom). That seems to be beyond the scope of the Government Claims Act.

Similarly, LASC points out that courts may “contract for county counsel services pursuant to section 77212.”³³ That could perhaps include some types of representation (e.g., negotiating a business transaction for the court) that are beyond the scope of the Government Claims Act. The staff is not sure of this and encourages input on the point.

- Section 811.9 says that “[t]he county counsel ... may, but [is] not required to, provide representation or defense *for the Judicial Council*.”³⁴ It is not clear whether that sentence (1) only authorizes a county counsel to represent the Judicial Council itself, or (2) also authorizes a county counsel to represent the judicial branch entities and individuals for which the Judicial Council must arrange representation (e.g., superior courts and their officers and

31. Memorandum 2002-14, Exhibit p. 22. Contra Costa County Superior Court also raised some concerns about reimbursement of a judge who has to pay for representation out of the judge’s own pocket. See *id.* Although the court referred to Section 27647 in expressing those concerns, they appear to relate to Section 27648, not to Section 27647. They are therefore described later in this memorandum (in the discussion of Section 27648), not here.

32. Section 77212(d) says in part: “If a trial court desires to receive or continue to receive a specific service from a county or city and county as provided in subdivision (c), and the county or city and county desires to provide or continue to provide that service as provided in subdivision (b), the presiding judge of that court and the county or city and county shall enter into a contract for that service.”

33. Section 68111 provides: “Whenever any judge of any court of this state is a witness in his official capacity as judge in any action or proceeding, such judge shall be entitled to be represented at such action or proceeding by counsel of his choice.”

34. Emphasis added.

employees). If the quoted sentence only authorizes a county counsel to represent the Judicial Council itself, then perhaps statutory language expressly giving county counsels the latter type of authority would also be helpful.

In light of these considerations, proposing to repeal Section 27647 might not be the only reasonable alternative. Another possibility would be to propose an amendment like the following:

Gov't Code § 27647 (amended). Representation of court or judge by county counsel

SEC. ____ . Section 27647 of the Government Code is amended to read:

27647. (a) If requested to do so by the ~~superior court of the county of the county counsel, or by any judge thereof~~ Judicial Council when the Government Claims Act (Division 3.6 (commencing with Section 810) of Title 1) applies, or by the local superior court or any judge thereof when that act does not apply, and insofar as ~~such~~ these duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent ~~any such~~ the superior court or a judge thereof in all matters and questions of law pertaining to any of ~~such~~ the judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, ~~such~~ the court or judge is concerned or is a party.

(b) This section does not apply to any of the following:

- (1) Any criminal proceedings in which a judge is a defendant.
- (2) Any grand jury proceedings.
- (3) Any proceeding before the Commission on Judicial Qualifications.
- (4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.

Comment. Section 27647 is amended to reflect the enactment of Section 811.9 (2000 Cal. Stat. ch. 447, § 4.5) and subsequent legislation clarifying and solidifying the Judicial Council's role in handling claims against trial courts and trial court personnel (see 2002 Cal. Stat. ch. 1007 and 2005 Cal. Stat. ch. 706, § 16; see also Sections 810-998.3; Cal. R. Ct. 20.201-10.203).

For purposes of a tentative recommendation, which approach would the Commission like to follow?

SECTION 27648. REIMBURSEMENT WHERE JUDGE IS REQUIRED TO RETAIN OWN
COUNSEL DUE TO CONFLICT OF INTEREST

Section 27648 was enacted in 1977 and has never been amended.³⁵ It provides:

If, because of a declared conflict of interest, any judge, who is otherwise entitled to representation pursuant to Section 825, 995, or 27647, is required to retain his own counsel, such judge is entitled to recover from the appropriate public entity such reasonable attorney's fees, costs, and expenses as were necessarily incurred thereby.

In the 2001 tentative recommendation on trial court restructuring, the Commission did not propose any revisions of Section 27648. Instead, the Commission reproduced the section in the tentative recommendation and included the following Note:

Note: Comment Requested. Government Code Section 27648 will require revision if Government Code Section 27647 is repealed as proposed in this tentative recommendation. The Commission solicits comment on whether the provision should be amended to delete the reference to Section 27647, repealed in its entirety due to the enactment of Government Code Section 811.9, continued with revisions in Section 811.9, or otherwise revised.

In response to this Note, LASC said: "At minimum, any amendment to this section must preserve the principle that any judge otherwise entitled to representation who is required to retain his or her own counsel is entitled to reimbursement, unless this principle is implemented elsewhere in the Code."³⁶ Contra Costa County Superior Court agreed, but also urged the Commission to go further:

[T]here are no specific provisions in GC 811.9 for reimbursement of attorney fees where a judge (or other court staff member) is required to retain their own counsel due to conflict of interest. While GC 27647 [sic] limits this protection to judges, all court staff should have this reimbursement provision. That could be accomplished by repealing GC 26747 [sic] and expanding GC 811.9.³⁷

In light of those comments, the Commission decided to study Section 27648 further before proposing any revisions.

35. See 1977 Cal. Stat. ch. 745, § 2.

36. Memorandum 2002-14, Exhibit p. 54.

37. Memorandum 2002-14, Exhibit p. 22. Although the court referred to "GC 27647" and "GC 26747," it is clear from the context that the court meant to refer to Section 27648.

Importantly, a broad reimbursement requirement along the lines suggested by Contra Costa County Superior Court already exists in the Government Claims Act. Under Section 996.4, any employee or former employee of a “public entity” is entitled to reimbursement of “reasonable attorney’s fees, costs, and expenses” in specified circumstances:

996.4. If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney’s fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4.

Nothing in this section shall be construed to deprive an employee or former employee of the right to petition for a writ of mandate to compel the public entity or the governing body or an employee thereof to perform the duties imposed by this part.

Given the existence of this reimbursement provision in the Government Claims Act, and the language in Section 811.9 making the Government Claims Act applicable to the judicial branch, Section 27648 may be obsolete with regard to at least two of the three types of representation it mentions: “representation pursuant to Section 825” and “representation pursuant to Section ... 995,” both of which fall within the Government Claims Act. To the extent that there is any difference in coverage between Section 27648 and Section 996.4, the latter section would appear to control, given the “notwithstanding” clause in Section 811.9.

The other type of representation mentioned in Section 27648 is “representation pursuant to Section ... 27647.” **The proper approach to Section 27648 may thus depend on how the Commission decides to handle Section 27647:**

- *If Section 27647 is repealed (as the Commission proposed in 2001), then Section 27648 will no longer need to refer to “representation pursuant to ... Section 27647.” Because the references to “representation pursuant to Section 825” and “representation pursuant to Section ... 995” may also be obsolete, the whole section might be ripe for repeal.*

- *If Section 27647 is retained (as discussed above), then Section 27648 might still be needed, at least for matters beyond the scope of the Government Claims Act. An amendment limiting the section to such matters might be in order.*

The Commission needs to decide in concept how to handle Section 27648 for purposes of a tentative recommendation. The staff will draft implementing language after the Commission makes that decision. **Comments on this issue, or on any of the other aspect of this memorandum, would be much appreciated.**

NEXT STEP

If the Commission decides to proceed with any of the reforms discussed in this memorandum, or other revisions of the provisions in question, the next step would be to include the proposed revisions in a tentative recommendation. That could be done in a short, stand-alone proposal, which the staff probably could prepare relatively soon. Alternatively, the reforms could be coupled with other material (e.g., proposed revisions relating to judicial benefits) in a larger tentative recommendation at a later time. **Which approach would the Commission prefer to follow?**

Respectfully submitted,

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